Supreme Court of the United States

OCTOBER TERM, 1941

No. ------

WALTER G. QUERY, JOHN P. DERHAM AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, AND MAJOR WILLIAM R. TOMY, UNITED STATES ARMY, INDIVIDUALLY AND AS POST EXCHANGE OFFICER, FORT JACKSON, SOUTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT, WITH SUPPORTING BRIEF

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PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT, WITH SUPPORTING BRIEF

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your petitioners pray that a writ of *certiorari* issue to review the judgment of the Circuit Court of Appeals in the above-entitled cause for the Fourth Circuit, entered in the above-entitled cause, on the 27th day of June, 1941 (121

Fed. (2d), 631), affirming judgment of the District Court of the United States for the Eastern District of South Carolina (37 Supp., p. 972), granting a permanent injunction restraining the petitioners from enforcing, or attempting to enforce, the provisions of Act No. 574, as Amended, with respect to sales of taxable commodities by Post Exchanges in South Carolina.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals reported in 121 Fed. (2d), 631. The opinion of the District Court for the Eastern District of South Carolina is reported in 37 Fed. Supp., 972.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on the 27th day of June, 1941 (Record, page 56). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether or not post exchanges, ships' service stores and marine post exchanges, operated in South Carolina, are subject to a sales tax on commodities sold by these organizations while operating in South Carolina?

2. Whether or not army post exchanges, navy ships' service stores and marine post exchanges, as operated, are instrumentalities of the United States and not subject to sale taxes on non-essential commodities sold by them in South Carolina?

3. Whether or not under the provisions of Act of Congress, approved October 9, 1940, Public No. 819, 76th Congress, 3rd Session, removing the immunity from State

taxes on Federal reservations, army post exchanges, naval ships' service stores and marine post exchanges must pay the South Carolina sales taxes on taxable commodities sold and distributed by them?

STATUTES INVOLVED

The taxing statute, Act No. 574, Acts of 1928, as amended, incorporated in Code of Laws of South Carolina, 1932, as Sections 2527-2557, inclusive, the pertinent parts of which are contained in the record, page 43.

Act No. 861, Acts of the General Assembly of South Carolina, approved the 30th day of April, 1938 (Record, page 46).

Public Act 819, 76th Congress, 3rd Session (Record, page 47).

STATEMENT

Respondents' action is to secure a permanent injunction against petitioners enforcing the provisions of Act No. 574, Acts of the General Assembly of 1928, as amended, incorporated in the Code of 1932, as Sections 2527-2557, inclusive, levying a sales tax on certain commodities sold or distributed in South Carolina when such sales or distributions are made by army post exchanges, naval ships' service stores and marine post exchanges.

There is also involved in this action, Act No. 861, Acts of the General Assembly of South Carolina, 1938, levying a use tax on certain commodities used in South Carolina, the question being whether or not these organizations of army and navy personnel are required to collect the use tax on commodities not theretofore subject to the sales tax?

Also involved in this action is whether or not under the provisions of Act No. 819, 76th Congress, 3rd Session, army post exchanges, naval ships' service stores and ma-

rine post exchanges are instrumentalities of the United States?

Act No. 819, 76th Congress, 3rd Session, removed the immunity from State sales or use taxes on the sale or use of personal property on Federal reservations, but provided that these sales or use taxes could not be levied against the United States or any of its instrumentalities.

This action was commenced in the District Court for the Eastern District of South Carolina, a three-judge Court being called, pursuant to and under the provisions of Section 266 of the Judicial Code.

After hearing arguments, the three-judge Court held that this was not a proper case for a three-judge Court, therefore, a decision was rendered by the District Judge and provided that any appeal therefrom must be taken to the Circuit Court of Appeals and not directly to this Court. However, the other two Judges sitting with the District Judge, concurred in the opinion of the District Judge (37 Fed. Supp., 972).

The District Court held that army post exchanges, ships' service stores and marine post exchanges were instrumentalities of the United States, not by reason of any Congressional authorization or requirement, but by reason of army regulations permitting superior officers to establish these organizations wherever needed. This decision of the District Court was affirmed by the Circuit Court of Appeals in an opinion not yet reported.

Respondents are engaged in the business of operating general merchandise stores in South Carolina, some of these stores being operated on and some off Federal reservations. These general merchandise stores are owned exclusively by the personnel of the army, navy and marine; they sell certain commodities, such as cigarettes, tobacco products, soft drinks, beer and wine, which are subject to a sales tax un-

der the South Carolina Statutes. These commodities are also subject to a use tax, if when used they have not theretofore borne the sales tax. None of these commodities sold in these stores are necessary for the personnel to have in order that they may properly carry out their official duties and functions to the Federal Government.

The only exemption contained in the Act of Congress removing the immunity from these taxes on Federal reservations is on sales by the United States or its instrumentalities. The Tax Commission, as an administrative body, concluded that post exchanges, and similar organizations, being owned exclusively by the personnel and operated solely for their benefit, were not instrumentalities of the United States and exempted from the sales tax, or from the requirement of collecting the use tax, in case the sales tax was not paid (This conclusion by the Tax Commission has been disapproved by the District Court and the Circuit Court of Appeals).

REASONS FOR GRANTING THE WRIT

1. The question involved in this litigation is of utmost importance to many states. There are more than twenty (20) states which impose a sales tax on certain non-essential commodities, or a general sales tax on all retail sales made within such states. There are many suits now pending in the various states to determine whether or not these sales are taxable.

2. The decision in the instant case for which a petition for a writ of *certiorari* is prayed is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit, in the case of *Pan American Petroleum Corporation v. State of Alabama*, 67 Federal (2d), 590. *Certiorari* was denied in that case on February 12, 1934, 291 U. S., 670, 54 Supreme Court Reporter, 454. In the instant case

the Court has held that army post exchanges, naval ships' service stores and marine post exchanges are instrumentalities of the United States, and not subject to a sales tax. The Circuit Court of Appeals for the Fifth Circuit, in the *Alabama case*, has held post exchanges not to be instrumentalities of the United States and subject to taxation by the State of Alabama.

3. The Circuit Court of Appeals having decided an important question of Federal law in this case, which has not been, but should be settled by this Court. The Circuit Court of Appeals for the Fourth Circuit has decided that question in direct conflict with a former decision of the Circuit Court of Appeals for the Fifth Circuit.

4. Act No. 819, 76th Congress, 3rd Session, removed the immunity from State sales tax on Federal reservations. This Act of Congress, not having heretofore been construed by this Court, should be definitely settled as to the proper construction thereof in order that the many states involved may properly administer the states' laws.

WHEREFORE, upon this petition, upon the annexed brief, and upon a certified transcript of the record of the proceedings in the District Court for the Eastern District of South Carolina, and in the Circuit Court of Appeals for the Fourth Circuit, petitioners pray that a writ of *certiorari* be issued to them and that said cause may be reviewed and determined by this Court as provided by law, and that upon such review the said judgment of the Circuit Court of Appeals for the Fourth Circuit be reversed.

JOHN M. DANIEL,
Attorney General.
CLAUDE K. WINGATE,
Attorneys for Petitioners.

September, 1941.

Supreme Court of the United States

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINIONS OF COURTS BELOW

The opinion of the District Court is reported in 37 Fed. Sup., 972; the opinion of the Circuit Court of Appeals in 121 Fed. (2d), 631 (decided June 27, 1941).

II

JURISDICTION

The date of judgment sought to be reviewed is June 27, 1941.

The jurisdiction of this Court is invoked under the provisions of the Judicial Code, Sec. 240(a), as amended by Act of February 13, 1925.

III

STATEMENT

The statement contained in the petition sufficiently sets forth the controlling facts.

IV

SPECIFICATION OF ERROR

The ruling of the District Court and affirmed by the Circuit Court of Appeals, as set out in the petition, which held army post exchanges, naval ships' service stores and marine post exchanges instrumentalities of the United States and not subject to State sales tax, is assigned as error.

V

ARGUMENT

The Act of Congress, approved October 9, 1940, Public Act No. 819, 76th Congress, 3rd Session, removed immunities of State taxes on Federal reservations. That Act provided, however, that no sales taxes should be collected by the State from the United States or any of its instrumentalities.

Under the provisions of Act No. 574, Acts of the General Assembly of South Carolina, 1928, as amended, a sales

tax is levied on the sale or distribution of certain non-essential commodities. The only question, as we see it in this case, is whether or not army post exchanges, naval ships' service stores, marine post exchanges, officers clubs and non-commissioned officers clubs, are instrumentalities of the United States and exempt from the South Carolina sales tax.

There is no Act of Congress permitting or directing the operation of any of these organizations, and they are operated solely under regulations of the war department and permission from superiors. The United States has no pecuniary interest therein, nor does it share in any of the profits.

The District Court held:

> "We are of opinion that the provisions of the state statute are not applicable to the activities of the Post Exchanges, that the Federal Act does not give to the defendants the power to enforce such provisions against such activities, and that the order of the defendants to enforce the provisions of the state statute against such activities and their threat to enforce and their attempts to enforce the same constitute an interference with the activities of the United States, and are unconstitutional."

United States v. Query et al., 37 Fed. Supp., 975.

The Circuit Court of Appeals for the Fourth Circuit, on appeal from the decision of the District Court, held:

> "We are in accord with the conclusions reached upon the question of jurisdiction, and upon the merits of the controversy, and the judgment is therefore affirmed upon the opinion of the District Judge."

Walter G. Query et al., v. U. S. of America et al., 121 Fed. (2d), 631, decided June 27, 1941.

We find a conflict in the decision of the Circuit Court of Appeals for the Fifth Circuit, in which it was held:

> "(3, 4), It is to be conceded that an excise tax on the sales of gasoline is inoperative as to sales made to

the United States, either directly or indirectly through one of its departments, for government use. *Panhandle Oil Company v. State of Mississippi*, 277 U. S., 218, 48 S. Ct., 451, 72 L. Ed., 857, 56 A. L. R., 583. There a sale of gasoline was made direct to the United States for the use of the coast guard and a government hospital. No doubt the ruling would have been the same if the sales had been made directly to these instrumentalities of the government, for then also the United States would have been the real purchaser. But the tax here is not on the sale but is on the withdrawal of the gasoline. Furthermore, a post exchange is, of course, not the government, nor is it a department or instrumentality thereof. On the contrary, a post exchange is a voluntary, unincorporated, co-operative association of army organizations in which all share as partners in the profits and losses. The government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to post exchanges at Camp McClellan and Maxwell Field are not exempt from the state excise taxes."

Pan American Petroleum Corporation v. State of Ala., 67 Fed. (2d), 590;

Certiorari denied February 12, 1934, 291 U. S., 670, 54 Sup. Ct. Rep., 454.

CONCLUSION

It is apparent that this is a question of utmost importance to the various states levying sales or use taxes, and it is submitted that the decision of the Circuit Court of Appeals for the Fourth Circuit holding these organizations to be instrumentalities of the United States and not subject to States sales or use tax is erroneous.

It is also submitted that there is clearly a conflict in the decision in this case with that of the *Alabama case* from the Fifth Circuit Court of Appeals.

For the reasons assigned in the petition and in this brief, the writ of *certiorari* should be granted and the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Attorney General,
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Attorneys for Petitioners.

September, 1941.

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